

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.2851 OF 2006**

1.Robert Joseph Patel
2.Donald Robert Patel
3.Halling Robert Patel
4.Ms Sharon Robert Patel
5.Ms Janet Joseph Patel

...Appellants

vs.

1.The Municipal Corporation of
Greater Mumbai
2.The Assistant Municipal Commissioner
of M.M.C.,P/North Ward

...Respondents

Ms N.V.Sanglikar i/b Mr.M.S.D'Mello for the Appellants
Mr.J.J.Xavier for Respondents.

**CORAM: A.S.OKA, J.
DATE : FEBRUARY 27, 2007.**

ORAL JUDGMENT:

1. The submissions of the learned Counsel for the parties were heard on the last date. The appellants are the original plaintiffs and the respondents are the original defendants. The Appellants by filing a suit prayed for declaration that the notice dated 24th September 2002 and notice in rejoinder dated 20th August 2003 issued by the Respondents were illegal, void and bad in law. The suit filed by the appellants has been dismissed by the trial court on merits.

2. The notice dated 24th September 2002 was issued by the Respondents under section 351 of the Mumbai Municipal Corporation Act, 1888 (hereinafter referred to as the said Act of 1888). In the said notice it was alleged that the

Predecessor of the Appellants had carried out illegal extension to the existing structure with B.M.Wall and A.C.Sheet roof admeasuring 34ft. X 25 ft. and construction of Varandah with M.S.Pipe and A.C.Sheet roof admeasuring 25 Ft. X 10 ft. A reply was sent by the Predecessor of the Appellants to the said notice. On the basis of the said reply, further notice was issued on 20th August 2003 by the Respondents for demolition of the alleged offending structure.

3. One of the main submissions of the learned Counsel for the Appellants is that the assessment bills and other documents produced on record of the trial court show that the suit structure was in existence in the year 1961-1962 i.e. prior to the datum line and therefore, as per the policy adopted by the Respondents, suit structure will have to be protected. When the said submission was made, a query was made to the Advocate for the Appellants as regards proof of documents relied upon by the Appellants in support of the said submission and especially the proof of assessment bills. The learned Counsel for the Appellants submitted that though a detailed Affidavit of evidence of one of the Appellants is on record, inadvertently, formal proof of the said documents which are very relevant remained to be incorporated in the Affidavit of evidence. The learned Counsel for the Appellants submitted that very old documents are available which were placed on record of the suit and only because formal proof of

the said documents is not incorporated in the Affidavit of evidence, a genuine case of the Appellants should not be allowed to be suffer. She, therefore, submitted that an opportunity may be made available to the Appellants to lead further evidence by remanding the suit. The learned Counsel for the Respondents opposed the said submission by pointing out that sufficient opportunity was made available to the Appellants to lead evidence and to prove all the documents relied upon by them. He, therefore, submitted that no interference is called for.

4. I have considered the submissions. The basic case of the Appellants is that the suit structure was in existence prior to year 1961-1962. The assessment bills and property taxes bills were placed on record by the Appellants. However, no evidence was led to prove the said documents and to connect the said documents with the disputed structure. Perusal of the reply submitted by the Appellants to the notice under section 351 of the Mumbai Municipal Corporation Act of 1888 shows that even at that stage, the Appellant relied upon the old record.

5. There is a policy adopted by the Respondents to tolerate the structures which were in existence before the datum line. This is a case where an attempt has been made by the Appellants to place on record certain old documents which

allegedly relate to the suit structure. However, in the Affidavit of examination-in-chief, there is no reference to the said old documents. Considering the facts of the case, an opportunity deserves to be granted to the Appellants to lead further evidence. It will be open for the Respondents to lead further evidence in the light of evidence which may be adduced by the Appellants after remand. Prejudice which may be caused to the Respondents may be compensated by ordering payment of costs. Today, the learned Counsel for the Appellants has handed over a demand draft in the sum of Rs.7,500/- drawn in favour of the first Respondent towards costs to the Advocate for the first Respondent.

6. Considering the facts and circumstances of the case, the amount of costs of Rs.7,500/- is reasonable.

7. Hence, I pass the following order :

- i) Impugned Judgment and Decree is quashed and set aside and the L.C.Suit No.4214 of 2003 is remanded back to the Trial Court for hearing afresh.
- ii) The parties are directed to appear before the trial court on 2nd April 2007 at 11.00 a.m. The Appellants are permitted to lead further evidence in addition to the evidence which is already on record. The

Respondents will also be entitled to lead further evidence and will also be entitled to recall the witness already examined by the Appellants for further cross examination in the light of evidence which may be led by the Appellants after remand.

- iii) The Appellants will not seek adjournment on any unreasonable ground and will cooperate for early disposal of the suit.
- iv) The learned Trial Judge will consider the evidence which is already on record and the evidence which may be adduced by the Appellants and the Respondents after remand and will decide the suit afresh as expeditiously as possible on or before 31st October 2007.
- v) Till the disposal of the suit, both the parties will maintain status quo as of today in respect of the suit structure in all respects.
- vi) Appeal is partly allowed in above terms.
- vii) Writ to be sent immediately.
- viii) Parties and the concerned Court to act upon an authenticated copy of this order.

JUDGE